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No. 96-1279

In the Supreme Court of the United States

OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Summary of argument	12
Argument	15
I. Instructional omissions or misdescriptions of one element of an offense are "trial errors" subject to harmless-error review, not "structural errors" categorically immune from such review	16
II. The *Staples* error in this case was harmless	21
A. A defendant may not challenge his conviction on the ground that the jury was given an inadequate opportunity to reject his own sworn testimony on an uncontested issue	21
B. Petitioner's unequivocal admissions at trial were coextensive in scope with the limited scienter element erroneously omitted from the jury instructions	38
Conclusion	41

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991)	12, 16, 18, 27, 35
Bailey v. *United States*, 116 S. Ct. 501 (1995)	23
Bollenbach v. *United States*, 326 U.S. 607 (1946)	25
Brady v. *Maryland*, 373 U.S. 83 (1963)	26
Cabana v. *Bullock*, 474 U.S. 376 (1986)	17
California v. *Roy*, 117 S. Ct. 337 (1996)	18, 19, 20, 23, 25

Cases—Continued: Page

Carella v. *California*, 491 U.S. 263 (1989) 11, 14, 17, 19, 20, 30
Cavender v. *Cavender*, 114 U.S. 464 (1885) 36
Chapman v. *California*, 386 U.S. 18 (1967) 21, 24, 27
Connecticut v. *Johnson*, 460 U.S. 73 (1983) 14, 29, 30, 31, 32
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 12, 24, 26, 34-35
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 35, 37
Estelle v. *McGuire*, 502 U.S. 62 (1991) 33
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 16
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 15
Hennessy v. *Goldsmith*, 929 F.2d 511 (9th Cir. 1991) 12
Horning v. *District of Columbia*, 254 U.S. 135 (1920) 14, 36, 37
Johnson v. *United States*, 117 S. Ct. 1544 (1997) 15, 17, 18
Kotteakos v. *United States*, 328 U.S. 750 (1946) 27
Krzeminski v. *Perini*, 614 F.2d 121 (6th Cir.), cert. denied, 449 U.S. 866 (1980) 29, 30
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 16
McNally v. *United States*, 483 U.S. 350 (1987) 23-24
Motes v. *United States*, 178 U.S. 458 (1900) 14, 22, 27, 28, 29, 32, 33, 35
Nix v. *Whiteside*, 475 U.S. 157 (1986) 35-36
Pope v. *Illinois*, 481 U.S. 497 (1987) 17, 18, 20, 26
Rose v. *Clark*, 478 U.S. 570 (1986) ..... *passim*
Sandstrom v. *Montana*, 442 U.S. 510 (1979) 29
Staples v. *United States*, 511 U.S. 600 (1994) 9, 10, 12-13, 15, 23, 39, 40
Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 11, 16, 17, 18, 22, 24, 26, 37
Taylor v. *Louisiana*, 419 U.S. 522 (1975) 35
Tumey v. *Ohio*, 273 U.S. 510 (1927) 16

Cases—Continued: Page

United Bhd. of Carpenters & Joiners v. *United States*, 330 U.S. 395 (1947) 25
United States v. *Anderson*, 885 F.2d 1248 (5th Cir. 1989) 39
United States v. *Aramony*, 88 F.3d 1369 (4th Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997) 18
United States v. *Bagley*, 473 U.S. 667 (1985) 26
United States v. *Corso*, 20 F.3d 521 (2d Cir. 1994) 9
United States v. *Gaudin*, 515 U.S. 506 (1995) 15, 20, 23, 35, 37
United States v. *Gonzalez*, 719 F.2d 1516 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984) 8-9
United States v. *Johnson*, 71 F.3d 139 (4th Cir. 1995) 23
United States v. *Lopez*, 100 F.3d 98 (9th Cir. 1996), cert. denied, 117 S. Ct. 1824 (1997) 18
United States v. *Maloney*, 71 F.3d 645 (7th Cir. 1995), cert. denied, 117 S. Ct. 295 (1996) 18
United States v. *Mechanik*, 475 U.S. 66 (1986) 22, 34
United States v. *North*, 910 F.2d 843, modified, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991) 30
United States v. *Palmieri*, 21 F.3d 1265 (3d Cir.), vacated and remanded, 513 U.S. 957 (1994) 9
United States v. *Thomas*, 116 F.3d 606 (2d Cir. 1997) 36
United States v. *Vasquez*, 476 F.2d 730 (5th Cir.), cert. denied, 414 U.S. 836 (1973) 8
United States v. *Washington*, 705 F.2d 489 (D.C. Cir. 1983) 36
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 16
Waller v. *Georgia*, 467 U.S. 39 (1984) 16, 37
Weiler v. *United States*, 323 U.S. 606 (1945) 21, 25
Yates v. *Evatt*, 500 U.S. 391 (1991) 17, 25, 28, 30, 32

Constitution, statutes and rule: Page

U.S. Const. Amend. VI (Confrontation Clause) 26
Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181 (repealed 1948) 27
18 U.S.C. 922(o) 2, 4, 10
18 U.S.C. 924(c)(1) 23
18 U.S.C. 2113 23
26 U.S.C. 5845(a) 5, 7, 9, 18
26 U.S.C. 5861 ..... 5, 9, 15, 39
26 U.S.C. 5861(d) 2, 5, 10
26 U.S.C. 5861(i) 2, 5, 10
26 U.S.C. 5871 2
28 U.S.C. 2111 27
Fed. R. Crim. P. 52(a) 27

Miscellaneous:

Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167 (1995) 28
9 *Wigmore on Evidence* (Chadbourn rev. ed. 1981) 33

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 94 F.3d 1519.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996. A petition for rehearing was denied on January 6, 1997. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on February 12 and was granted on May 27, 1997, limited to the question set forth in the Court's order. 117 S. Ct. 1841. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of knowingly possessing a machinegun, in violation of 18 U.S.C. 922(*o*) (Count 1);[1] one count of knowingly possessing a silencer not registered in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. 5861(d) (Count 2); and one count of knowingly possessing a silencer that lacked a serial number, in violation of 26 U.S.C. 5861(i) (Count 3). He was sentenced to 33 months' imprisonment, to be followed by three years' supervised release. See Pet. App. 6a. The court of appeals reversed petitioner's conviction for possessing a machinegun, but affirmed his other convictions. *Id.* at 1a-17a.

1. a. Just after midnight on March 15, 1991, a deputy sheriff in Broward County (Florida) saw petitioner driving his pickup truck erratically and instructed him to pull over to the side of the road. After charging him with drunk driving and resisting arrest, the officer searched petitioner and, in his pockets, found a .22 caliber handgun with matching ammunition as well as a magazine of .380 caliber ammunition for a different gun. The officer then searched petitioner's truck. Under a baseball cap resting on the front passenger seat, the officer found a .380 caliber "Beretta" pistol loaded with another

[1] The indictment printed in the Joint Appendix is the original indictment, which charged petitioner, in Count 1, with possession of an unregistered machinegun in violation of 26 U.S.C. 5861(d) and 5871. J.A. 6. The superseding indictment amended that language to charge petitioner with possession of a machinegun in violation of 18 U.S.C. 922(o).

round of ammunition. The Beretta was outfitted with a "flash suppressor," which is designed to suppress the flash of a gunshot to conceal its location. Elsewhere in the pickup truck, the officer discovered ammunition for a third gun: a Colt 10 mm. semiautomatic weapon. Pet. App. 2a; Tr. 117-122, 140-141.

Finally, behind the driver's seat, the officer found a black tool case containing one more gun—a .380 caliber MAC-11—along with seven rounds of ammunition, another flash suppressor, and a silencer. Tr. 123-131, 142. The MAC-11, originally manufactured as a semiautomatic weapon, had been manually converted into a fully automatic machinegun. Tr. 174-175. The silencer, which fit the barrel of that machinegun, was later tested and found to be fully functional. J.A. 23-25. It did not have a serial number and had not been registered in the National Firearms Registration and Transfer Record. Pet. App. 2a-3a.

b. That same night, after being advised of his rights, petitioner agreed to be interviewed by several federal and local law enforcement agents. At his request, the interview was taped. Petitioner acknowledged ownership of the .22 caliber pistol and the .380 caliber Beretta. J.A. 29-30. The agents then presented petitioner with the items found in the tool case and asked him whether he knew what they were. He identified each with confidence and precision:

> [Petitioner]: * * * I definitely know what they are.
>
> [Agent]: You do.
>
> [Petitioner]: Yes sir.
>
> [Agent]: Okay, what are they?

[Petitioner]: One is a, that is a .380, I think a MAC.

[Agent]: Okay.

[Petitioner]: And the other is a, that is a silencer.

See J.A. 30; see also J.A. 34 (readily identifying smaller objects taken from tool case as "baffles for a silencer"). Volunteering that he "kn[e]w the law" forbidding unauthorized possession of silencers and automatic weapons, J.A. 45-47; see also J.A. 65, petitioner disclaimed ownership of those items but could not explain how they had come to be in his truck, J.A. 31.

During the same interview, petitioner displayed an unusual familiarity with silencers. At one point, he offered: "If you want to ask me how to make a silencer, I'll tell ya. You get, you get a god damn oil filter, that's the best silencer you can get. Don't they teach you that in, in, in Special Forces? That's what they taught me." J.A. 33; see also J.A. 42 ("You know, you want a silencer, you, you, you get a, what's the best silencer. * * * [I]t's, it's a two liter bottle. I mean everybody knows that[.]"); J.A. 46 ("I could make silencers, for Christ's sake, I could do, I could do anything."). Asked how he knew so much about silencers, petitioner answered that, in addition to his Special Forces training, "I studied. * * * In fact, if you probably go to my house now there's a book on silencers," J.A. 36, "[s]ome screwball book that I bought at a gun show," J.A. 42.

2. a. It is unlawful, except in limited circumstances not applicable here, "for any person to * * * possess a machinegun." 18 U.S.C. 922(*o*). Similarly, it is

unlawful to possess unregistered or unserialized items that, like silencers, fall within the specialized definition of "firearm" contained in 26 U.S.C. 5845(a). See 26 U.S.C. 5861(d) and (i).[2] Petitioner was indicted under those provisions for unauthorized possession of a machinegun (Count 1), for possession of an unregistered silencer (Count 2), and for possession of a silencer with no serial number (Count 3).

At trial, the government elicited the testimony of, among other witnesses, the deputy sheriff who had searched petitioner's pickup truck and of firearms experts who confirmed that both the silencer and the machinegun found in the truck were fully functional. See J.A. 23-27. The government also played for the jury the tape recording of petitioner's interview, including the portions in which petitioner had identified the silencer as a silencer. J.A. 28-51.

Petitioner testified in his own defense. On direct examination, he denied that the silencer and machinegun were his, but he reaffirmed his expertise with such devices:

Q. Mr. Rogers, Government's Exhibit No. 5, do you know what this is?

A. This is a silencer, yes. I know exactly.

---

[2] Section 5861 provides that "[i]t shall be unlawful for any person * * * (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or * * * (i) to receive or possess a firearm which is not identified by a serial number as required by this chapter." Section 5845(a) provides that "[t]he term 'firearm' means * * * (7) any silencer (as defined in section 921 of title 18, United States Code)."

J.A. 69-70. Later, on cross-examination, petitioner reiterated that he had known what the silencer was the moment it was first shown to him on the night of his arrest:

> Q. And you also know exactly what this [the silencer] is the moment —
>
> A. I've used those silencers in Vietnam, yes, sir.
>
> Q. The moment Agent Armstrong showed it to you during your interview you said, "Oh, I know exactly what this is."
>
> A. Absolutely.
>
> * * * * *
>
> Q. * * * [Y]ou knew exactly what [the silencer baffles] were the moment they were shown to you?
>
> A. Absolutely, sir. When you depend [for] your life on silencers you know how to take them apart and work on them, you know their elements.

J.A. 74-75.

Petitioner's counsel focused his closing argument on the claim that the government had failed to prove that the machinegun and the silencer belonged to petitioner or that he had known they were in his truck. J.A. 90-98. In the course of that argument, however, petitioner's counsel reaffirmed petitioner's

sworn testimony that he knew exactly what those items were:

> They make, Government makes a big deal about the fact that [petitioner] readily is able to identify and explain what all these items are. * * * [S]ure, he knows what silencers are. Big deal. He knows what automatic weapons are. He reads books. He's a gun enthusiast. He goes to gun shows. That's not illegal. So what? Yes he knows what they are and he honestly said, "Yes, I know what they are," and expends [*sic*] what they are. That doesn't mean he knew about it, he had knowledge of it being in the back of his pickup truck. Don't jump to that conclusion like the Government wants you to do.

J.A. 94-95.

b. After the close of evidence, the district court told the jury that a silencer is a "firearm" within the specialized definition of 26 U.S.C. 5845(a). It then instructed that, to find petitioner guilty on Count 2 for possessing an unregistered silencer, the jury had to find, among other things, "[t]hat [petitioner] knowingly possessed a 'firearm,' as defined above." J.A. 104. The court added:

> It is not necessary for the Government to prove that [petitioner] knew that the item described in the indictment was a "firearm" which the law requires to be registered. * * * What must be proved beyond a reasonable doubt is that [petitioner] knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that i[t] was not then registered[.]

Ibid. The court issued a similar instruction with respect to Count 3, which charged petitioner with possessing a silencer without a serial number.[3]

Petitioner had earlier asked the court to instruct the jury that the government was required to prove, not just that he had knowingly possessed certain items and that those items were "firearms" within the statutory definition, but also that he "knew [them] to be 'firearms'" when he possessed them. J.A. 12. Put another way, petitioner asked for an instruction requiring the government to prove that he had known that his machinegun was a machinegun and that his silencer was a silencer.[4] Relying on circuit precedent, the district court denied the motion. J.A. 86 (citing *United States* v. *Vasquez*, 476 F.2d 730 (5th Cir.), cert. denied, 414 U.S. 836 (1973)); see also *United States* v. *Gonzalez*, 719 F.2d 1516,

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[3] The court instructed that, to find petitioner guilty on Count 3, the jury had to find: (1) "[t]hat [petitioner] * * * knowingly possessed a 'firearm,' as defined above," (2) "[t]hat the 'firearm' had no serial number," and (3) "[t]hat [petitioner] knew that the firearm had no serial number." J.A. 105. With respect to Count 1, which charged petitioner with possession of a machinegun, the court instructed that the government was required to prove: (1) that petitioner possessed the gun identified in the indictment, (2) that the gun "was a machinegun," and (3) that "such possession was knowing." J.A. 103.

[4] See J.A. 54-55 (argument by petitioner's counsel: "They have to establish the person knew it was a firearm and they had to know that it existed. They *didn't* have to know that it was unregistered or the government does *not* have to prove that the defendant knew it was supposed to be registered.") (emphasis added); J.A. 84 ("the government is required to prove that the defendant knew that items in question were 'firearms under Act[,]' not that items in question were 'firearms within general meaning of the term'").

1522 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984). At the time of trial, the majority of federal circuits had held that, in prosecutions under Section 5861 for possession of unregistered "firearms," the government was not required to prove that a defendant knew that the item in his possession had all of the characteristics that made it a "firearm" within the meaning of Section 5845(a). See *Staples* v. *United States*, 511 U.S. 600, 636-637 & nn.22-23 (1994) (Stevens, J., dissenting); *United States* v. *Palmieri*, 21 F.3d 1265, 1273-1274 & nn.7-9 (3d Cir.) (discussing case law), vacated and remanded, 513 U.S. 957 (1994); *United States* v. *Corso*, 20 F.3d 521, 526-527 (2d Cir. 1994) (same).

c. The jury found petitioner guilty on all three counts. Tr. 406. In so doing, it found beyond a reasonable doubt that he had possessed, and had known that he possessed, the items in his black tool case, including the silencer.

3. After the jury had returned its guilty verdict, and shortly before the district court entered final judgment, this Court decided *Staples*. The defendant in that case was convicted under Section 5861 of possessing an unregistered weapon that had originally been manufactured as a semiautomatic rifle but had later been converted—according to the defendant, without his knowledge—into a fully automatic machinegun. 511 U.S. at 603. This Court held that the district court had erred in failing to require the government to prove that the defendant "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." *Id.* at 602. The *Staples* decision does not, however, require the government to prove that a defendant had knowledge that the law requires

registration of "firearms," see *id.* at 638 (Stevens, J., dissenting), or that the defendant knew that his "firearm" was in fact unregistered, see *id.* at 608-609 (majority opinion).

On petitioner's appeal, the government conceded that *Staples* required reversal of petitioner's conviction on Count 1 for possession of a machinegun under Section 922(*o*), because the evidence at trial had not established that petitioner knew that the MAC-11, originally manufactured as a semiautomatic weapon, had been modified to act as a fully automatic machinegun. The court of appeals agreed and reversed petitioner's conviction on that count. Pet. App. 7a-8a. Petitioner also relied on *Staples*, however, to argue that his convictions on Counts 2 and 3 were invalid because, although the jury found that he had knowingly possessed the items in his black tool box, the district court had not told the jury that, to return a guilty verdict on those counts, it also had to find that he knew that the silencer was a silencer.

The court of appeals agreed with petitioner that, under *Staples*, the district court's instructions had "effectively omitted * * * an essential element" of the offense set forth in Section 5861(d). Pet. App. 8a; see also *id.* at 8a n.8 (assuming *arguendo* that *Staples* applies to offenses under Section 5861(i)). The court held, however, that the omission was harmless error. The court first rejected petitioner's argument that the omission of an element from jury instructions is a "structural error" that is immune from harmless-error analysis. See *id.* at 10a-12a. Instead, the court held, such errors are appropriately characterized as "trial errors," which "occur during the presentation of the case to the jury, and which may therefore be qualitatively assessed in the context of other evi-

dence presented." *Id.* at 12a (quoting *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (internal quotation marks omitted)).

The court of appeals then considered what methods of harmless-error analysis would be appropriate for determining whether this *Staples* error was in fact harmless. Relying on the concurring opinion in *Carella* v. *California*, 491 U.S. 263, 267-273 (1989) (Scalia, J., concurring in the judgment), the court held:

> [A]n instructional omission * * * may be viewed as harmless only in three rather infrequent scenarios: 1) Where the infirm instruction pertained to a charge for which the defendant was acquitted (and not affecting other charges); 2) *Where the omission related to an element of the crime that the defendant in any case admitted*; and 3) Where the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also finding the element.

Pet. App. 14a-15a (emphasis added). The court held that "the facts of this case fall squarely within the second category" because, both in his post-arrest interview and on the witness stand at trial, petitioner had "emphatically and without reservation admitted that he knew the item found in his truck was a silencer," an admission that his own attorney had "reiterated" during closing argument. *Id.* at 16a. Given those "unequivocal assertions" of knowledge, the court concluded, the instructional error had not contributed to the guilty verdict, and the error was therefore harmless beyond a reasonable doubt. *Id.* at

17a. The court added that reversal in these circumstances would require "a quixotic exercise of form over substance." *Ibid.* (quoting *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 (9th Cir. 1991)).

4. This Court granted certiorari limited to the following question: "Whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element." 117 S. Ct. 1841 (1997).

SUMMARY OF ARGUMENT

"The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986) (citation omitted); accord *Arizona* v. *Fulminante*, 499 U.S. 279, 308 (1991); *Rose* v. *Clark*, 478 U.S. 570, 577 (1986). The question presented here is whether that doctrine and its underlying rationale permit a reviewing court to affirm a conviction where the jury instructions erroneously omitted an element of an offense, but the defendant in any event admitted that element in open court. The answer to that question is yes: as this Court's precedent confirms, a defendant may not challenge his conviction on the ground that the jury was given an inadequate opportunity to reject the truth of his own unequivocal testimony on an uncontested issue.

The district court's error—a failure to instruct the jury on a knowledge element subsequently recognized by this Court in *Staples* v. *United States*, 511 U.S. 600

(1994)—is properly characterized as "trial error," which is amenable to harmless-error review, rather than "structural error," which is not. In a variety of contexts, this Court has recognized that errors affecting a single element in a trial court's jury instructions are susceptible to harmless-error analysis. That principle is applicable where the jury instructions correctly set forth all of the elements of an offense but one. In that context, the jury has returned a guilty verdict, and the single-element error neither pervaded the trial nor forecloses accepted methods of harmless-error review. At bottom, petitioner's claim is not that a *Staples* error is "structural" and immune from such review, but that the court of appeals used an improper method of harmless-error analysis in finding this particular error harmless.

Petitioner's argument on that point rests on two essential premises: first, that reliance on the strength of the evidence, even when overwhelming and uncontested, is never an appropriate method of determining that an instructional omission (or misdescription) of a single element is harmless, and, second, that a defendant's unequivocal, sworn admissions at trial are "simply pieces of evidence" for harmless-error purposes. Although it is far from clear that there is a categorical prohibition on the use of "overwhelming evidence" in harmless-error review of single-element instructional omissions—particularly in cases where there was, and could be, no dispute about the element at trial—this Court need not reach that issue here. That is because petitioner's attempt to equate a defendant's own admissions with other kinds of overwhelming evidence is inconsistent with the principle, first recognized by

this Court nearly 100 years ago, that sworn admissions made *by* a defendant at trial differ both in kind and in consequence from overwhelming evidence introduced *against* that defendant by the prosecution.

As that precedent confirms, "[i]t would be trifling with the administration of the criminal law" (*Motes* v. *United States*, 178 U.S. 458, 476 (1900)) to invalidate a defendant's conviction based on a failure to instruct the jury on an uncontested element that he admitted in open court: that error could be "of no consequence as to him; for in his own testimony enough was stated to require a verdict of guilty," *id.* at 475, so long as the jury found the other elements satisfied, which this jury did. See also *Carella* v. *California*, 491 U.S. 263, 270 (1989) (Scalia, J., concurring in the judgment); *Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (opinion of Blackmun, J.). Reversal in those circumstances would vindicate no cognizable individual right and no valid societal purpose.

In his own testimony, echoed by argument of counsel, petitioner unequivocally admitted the only element that the district court erroneously omitted from its instructions—his knowledge that the silencer found in his truck was, in fact, a silencer—and, by its verdict, the jury found that petitioner had knowingly possessed that item. Because a *Staples* instruction in this case would not have affected a rational jury's determination that petitioner was guilty, his position ultimately reduces to the claim (see, *e.g.*, Br. 39) that the district court's error compromised the jury's nullification power. Even if a defendant could ever legitimately complain on appeal about impairment of the jury's "power to bring in a verdict in the teeth of both law and facts," *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920), however, this jury's nullification power was not in fact impaired: The single-element instructional error at issue here had no bearing on the jury's ability or inclination to exercise that power on petitioner's behalf.

ARGUMENT

In failing to instruct the jury on the issue of petitioner's knowledge that his silencer was a silencer—an element of the offense under Section 5861, see *Staples* v. *United States*, 511 U.S. 600 (1994)—the district court committed error. See generally *United States* v. *Gaudin*, 515 U.S. 506 (1995).[5] The issue in this case, however, is not whether the district court committed error, but whether that error compels the reversal of petitioner's conviction. "We agree that the determination of guilt or innocence * * * is for the jury rather than the court. Harmless-error analysis addresses a different question: what is to be done about a trial error that * * * in practice clearly had no effect on the outcome?" *Rose* v. *Clark*, 478 U.S. 570, 582 n.11 (1986) (citation omitted). That inquiry has two aspects: first, whether instructional omissions (or misdescriptions) of one element of an offense are amenable to harmless-error review at all, and second, if so, whether the error in this case was in fact harmless in view of petitioner's admission of the omitted element in open court. We address the first issue in Point I below and the second in Point II.

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[5] That is so even though *Staples* had not yet been decided at the time of trial and controlling Eleventh Circuit precedent (see pp. 8-9, *supra*) foreclosed such an instruction. See *Johnson* v. *United States*, 117 S. Ct. 1544, 1549 (1997); *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987).

I. INSTRUCTIONAL OMISSIONS OR MISDESCRIPTIONS OF ONE ELEMENT OF AN OFFENSE ARE "TRIAL ERRORS" SUBJECT TO HARMLESS-ERROR REVIEW, NOT "STRUCTURAL ERRORS" CATEGORICALLY IMMUNE FROM SUCH REVIEW

1. In any criminal prosecution, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. at 579. In particular, "most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). This Court has distinguished between two general classes of constitutional error: "structural defects in the constitution of the trial mechanism," which are categorically immune from harmless-error review, and "error[s] in the trial process itself," which are subject to such review. *Id.* at 309, 310; see *id.* at 306-310 (collecting cases). Unlike "trial errors," "structural errors" generally affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds." *Id.* at 309-310. This Court has recognized only a handful of errors as structural. See *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (total denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge).

In a variety of contexts, the Court has consistently treated the type of error at issue here—errors in jury instructions involving a single element of an offense—as trial errors that are subject to harmless-error analysis. See *Yates* v. *Evatt*, 500 U.S. 391, 404-405 (1991) (erroneous rebuttable presumption); *Rose* v. *Clark*, 478 U.S. at 580 (same); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (erroneous conclusive presumption); *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987) (unconstitutional misdescription of element of offense); see also *id.* at 504 n.7 (rejecting the contrary dicta in *Cabana* v. *Bullock*, 474 U.S. 376, 384 (1986), on which petitioner relies (Br. 13)). For example, where a jury is erroneously instructed to presume an ultimate fact that constitutes an element of the offense from specified predicate facts, that error is nonetheless harmless if "no rational jury could find those [predicate] facts without also finding that ultimate fact," because, in that context, "making those findings is functionally equivalent to finding the element required to be presumed." *Sullivan*, 508 U.S. at 281; see also *Carella*, 491 U.S. at 266. That particular method of harmless-error analysis is not limited to erroneous presumptions; it should also apply to instructions that either inaccurately describe an element or omit it entirely.[6] In such cases,

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[6] In *Johnson* v. *United States*, 117 S. Ct. 1544 (1997), the Court declined to decide whether the omission of an element could be harmless error, but noted that "[i]t is by no means clear" that a single-element omission "fits within th[e] limited class" of structural errors, because such an omission "can just as easily be analogized to improperly instructing the jury on an element of the offense, * * * an error which is subject to harmless-error analysis," *id.* at 1550 (citing *Yates*, *Carella*,

the jury's findings on other elements or other counts may constitute the "functional equivalent" of the omitted or misdescribed element, thereby clearly rendering the error harmless. See, *e.g.*, *California* v. *Roy*, 117 S. Ct. 337, 339-340 (1996) (Scalia, J., concurring); *United States* v. *Lopez*, 100 F.3d 98, 102-105 (9th Cir. 1996), cert. denied, 117 S. Ct. 1824 (1997); *United States* v. *Aramony*, 88 F.3d 1369, 1383-1385 (4th Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997); *United States* v. *Maloney*, 71 F.3d 645, 657-658 (7th Cir. 1995), cert. denied, 117 S. Ct. 295 (1996).

Because at least one form of harmless-error analysis is available here, the *Staples* error in this case—the district court's failure to instruct the jury that, to convict, it had to find that petitioner knew that his silencer was a silencer—is properly characterized as a trial error, subject to harmless-error review, rather than a structural error, categorically immune from such review. A *Staples* error does not infect "[t]he entire conduct of the trial from beginning to end" or "the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. at 309-310. Instead, it removes only one element from the jury's consideration; the jury must otherwise consider the evidence and, before returning a guilty verdict, must determine that the defendant possessed the item in question, that he knew he possessed it, and that the item was in fact a "firearm" within the definition of 26 U.S.C. 5845(a). Like other types of instructional errors, such an error can be harmless if, for example, a jury's findings on the other elements or counts are "functionally equivalent" to the finding required

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Pope, and *Rose*), "as it can be to failing to give a proper reasonable-doubt instruction altogether," *ibid.* (citing *Sullivan*).

under *Staples*.[7] Regardless of the number of additional circumstances in which a *Staples* error can be harmless—and whether or not it is harmless where, as here, it concerns "an element of the crime that the defendant in any case admitted," *Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment)—the potential for such an error to be harmless on a particular trial record demonstrates that it is not an error "of the structural sort that def[ies] analysis by harmless error standards." *California* v. *Roy*, 117 S. Ct. at 339 (internal quotation marks omitted).

2. Although petitioner acknowledges that "[t]he omission of an element from the jury instructions does not, in and of itself, constitute 'structural error,'" Br. 25, and although he suggests that such errors could sometimes be harmless, see Br. 27-29, he nonetheless contends that the district court's error in this case *was* structural and that "the harmless-error doctrine simply has no role to play," Br. 26. Petitioner seeks to reconcile those two apparently contradictory propositions by redefining the district court's "error" as "the absence of an actual jury

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[7] For example, the "functional equivalence" analysis would render a *Staples* error harmless if a defendant were convicted on a charge of personally manufacturing and selling silencers in volume (or of conspiring to do the same): no "rational juror could plausibly * * * f[i]nd" (*Carella*, 491 U.S. at 270-271 (Scalia, J., concurring in the judgment)) the facts necessary for conviction without also finding that the defendant knew that his products were silencers. Similarly, in this case, if the district court had given a *Staples* instruction on Count 2 but not on Count 3, a conviction on the former count would embrace the functional equivalent of a finding on the element omitted from the instructions on the latter count.

verdict on each essential element of the offense." Br. 25.

This Court, however, has begun its harmless-error analysis in analogous cases by identifying the "error" at issue as the omission or misdescription of an element in the jury instructions, and that course is appropriate here as well.[8] Because such an error can be harmless in at least some cases, see pp. 17-19 & n.7, *supra*, a single-element instructional error is not structural error. The issue then presented is whether, in a particular case, the error is in fact harmless as determined by an appropriate *method* of harmless-error analysis. At bottom, petitioner's submission is that the court of appeals employed an *improper* method of such analysis to deem the *Staples* error in this case harmless.

That court found the error harmless on the ground that "the omission related to an element of the crime that the defendant in any case admitted." Pet. App. 14a (citing *Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment)). Petitioner's essential argument is that reliance on a defendant's unequivocal, sworn admission at trial is no more appropriate a method of finding an instructional omission harmless

[8] See, *e.g.*, *California* v. *Roy*, 117 S. Ct. at 339 (identifying "specific error at issue here" as "an error in the instruction that defined the crime" (*i.e.*, trial court's failure to instruct on "intent or purpose" in addition to "knowledge")); *Pope*, 481 U.S. at 501 (identifying error as "[t]he instruction at issue in this case," which inaccurately described element, and holding that defendants' convictions "are subject to salvage if the erroneous instruction is found to be harmless error"); see also *Gaudin*, 515 U.S. at 526 (Rehnquist, C.J., concurring) ("the Court has subjected jury instructions plagued by constitutional error to harmless-error analysis").

than would be an appellate court's "resol[ution of] conflicting evidence" to affirm a conviction on the ground that, in all likelihood, "the defendant was guilty." *Weiler* v. *United States*, 323 U.S. 606, 611 (1945). Petitioner's attempted equation of those two very different modes of review is mistaken, as we discuss below. But his argument on that point confirms that the issue in this case is the proper methodology for determining whether a single-element instructional error may be harmless on a particular record. When that is the issue, the error in question is not a structural error, but a trial error, and the ultimate question is whether "the error complained of * * * contribute[d] to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

II. THE *STAPLES* ERROR IN THIS CASE WAS HARMLESS

A. A Defendant May Not Challenge His Conviction On The Ground That The Jury Was Given An Inadequate Opportunity To Reject His Own Sworn Testimony On An Uncontested Issue

Petitioner claims that his conviction must be reversed because the district court did not instruct the jury to "find" what he had sworn was true: that he knew his silencer was a silencer. That claim rests on two propositions: that evidence, no matter how incontrovertible and undisputed, can never "mitigate a failure to instruct on an essential element," Br. 31, and that personal admissions made by a defendant in his testimony "are simply pieces of evidence" for harmless-error purposes, Br. 38. As we discuss below, this Court's decisions do not conclusively resolve the proper role of "overwhelming evidence" in

harmless-error review of single-element instructional errors where the element at issue is not reasonably subject to dispute and was essentially uncontested at trial. This case presents no need to resolve that issue, however, because, for harmless-error purposes, sworn admissions made *by* a defendant at trial differ both in character and in consequence from "overwhelming evidence" introduced *against* a defendant by the prosecution. As this Court declared nearly 100 years ago, see *Motes* v. *United States*, 178 U.S. 458 (1900), a defendant may not seek invalidation of his conviction, and burden the criminal justice system with the "substantial social costs" of a retrial, see *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986), solely by complaining that his jury was given an inadequate opportunity to reject the truth of his sworn testimony on an uncontested issue.

1. In advocating an absolute prohibition on any use of "overwhelming evidence" to find an instructional omission harmless, petitioner relies principally on this Court's statement in *Sullivan* v. *Louisiana* that "[t]he inquiry * * * is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." 508 U.S. at 279. *Sullivan* involved a flawed reasonable-doubt instruction that "vitiate[d] *all* the jury's findings" and therefore fell within the limited category of "structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." *Id.* at 281 (emphasis in original; internal quotation marks omitted). *Sullivan* did not involve the distinct type of error at issue here: an instructional omission (or misdescription) of a single element of an offense,

which neither "vitiates all the jury's findings" nor "defies analysis by harmless-error standards." See Point I, *supra*; *California* v. *Roy*, 117 S. Ct. at 338-339. Petitioner nonetheless argues that *Sullivan*'s preclusion of reliance on "overwhelming evidence" as a method of harmless-error review of a defective reasonable-doubt instruction applies equally where only one element of the offense is omitted or misdescribed.

At some point, this Court may need to decide whether incontrovertible evidence introduced against a defendant on an uncontested element may serve as a basis for finding an instructional omission or misdescription of that element to be harmless error. That issue arises principally in two settings. First, a court may occasionally overlook or misstate an instruction on a relatively straightforward and technical element of an offense, where the proof on that element is beyond question and the issue is not one that defense counsel seeks to address. See, *e.g.*, *United States* v. *Johnson*, 71 F.3d 139, 142-144 (4th Cir. 1995) (reversing armed robbery conviction under *Sullivan* because the judge had instructed the jury, based on undisputed facts, that a credit union was federally insured for purposes of 18 U.S.C. 2113). Second, the applicable law governing jury instructions may change when this Court rejects lower court precedent defining the elements of an offense;[9]

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[9] See, *e.g.*, *Staples*, *supra* (adding knowledge element); *Bailey* v. *United States*, 116 S. Ct. 501 (1995) (overturning circuit precedent concerning element of "using" a firearm in connection with a drug offense under 18 U.S.C. 924(c)(1)); *Gaudin*, *supra* (overturning circuit precedent holding that materiality element of false-statement and perjury offenses was issue for trial court, rather than jury, to decide); *McNally* v.

a particular defendant may anticipate this Court's ruling and raise an objection to the instructions, even while making clear that, as a tactical matter, he has no interest in contesting the evidence on that issue at trial.

As an original matter, it is sensible to regard "overwhelming evidence" introduced against a defendant in those circumstances as an appropriate basis for finding a single-element instructional omission (or misdescription) "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. There is undoubtedly "error" in such cases. But where the trial record shows that the element in question was overwhelmingly established and essentially undisputed, and where the jury had a fair opportunity to consider the remaining elements, affirmance on harmless-error grounds would preserve "public respect for the criminal process," *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986), without impairing a defendant's underlying right to a jury trial in any meaningful respect.

It is true that language in some of this Court's recent harmless-error decisions indicates that, as a general matter, it is inappropriate to rely on "overwhelming evidence" to determine what a jury would have found in the absence of an error, as distinguished from what the jury actually did find despite that error. See, *e.g.*, *Sullivan*, 508 U.S. at 280 (error cannot be deemed harmless where "[t]he most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable

United States, 483 U.S. 350 (1987) (overturning circuit precedent on the intangible rights theory under the mail fraud statute).

doubt"); *Yates*, 500 U.S. at 404 ("[T]he issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt."); see also *California* v. *Roy*, 117 S. Ct. at 339 (Scalia, J., joined by Ginsburg, J., concurring) ("The absence of a formal verdict on this point cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise.").[10] But other decisions have acknowledged that, at least in some contexts, a

[10] Petitioner cites several pre-*Chapman* decisions of this Court for the proposition that overwhelming evidence can never render harmless an instructional omission or misdescription of a single element of an offense. Language in some of those decisions supports that proposition, but the elements at issue in those cases were contested and possibly outcome-determinative. See, *e.g.*, *United Bhd. of Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408-409, 411-412 (1947) ("the necessity * * * for an instruction [on agency issue] is apparent" because, given the parties' varying degrees of involvement in the charged conduct, "the verdict might have resulted from the incorrect instruction," and, even with respect to the defendants who did not object at trial, reversal was required because "[t]he erroneous charge was on a vital phase of the case"); *Bollenbach* v. *United States*, 326 U.S. 607, 613-614 (1946) (because an erroneous instruction in response to a jury question concerning "a basic issue" in the prosecution resolved a seven-hour jury deadlock within five minutes, "[i]t would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous [instruction] given them as a guide"); *Weiler*, 323 U.S. at 611 ("We are not authorized to * * * resolve conflicting evidence[] and reach the conclusion that the error was harmless because we think the defendant was guilty."). In any event, none of those decisions reversed a conviction for failure to give an accurate jury instruction on an element that the defendant affirmatively *admitted* at trial.

reviewing court may take into account what the jury necessarily would have found if improperly excluded evidence had been admitted or if incorrect instructions had been correct. See *Pope*, 481 U.S. at 503 & n.6 ("[I]f a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand."); *Delaware* v. *Van Arsdall*, 475 U.S. at 684 (Confrontation Clause violations are subject to harmless-error analysis that requires reviewing court to "assum[e] that the damaging potential of the [erroneously denied] cross-examination were fully realized" and then surmise hypothetical effect on jury); see also *United States* v. *Bagley*, 473 U.S. 667, 674-675 (1985) (test for materiality of wrongly withheld exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), is whether, *if* it had been disclosed and introduced, "the suppressed evidence *might have* affected the outcome of the trial") (emphasis added); see generally *Sullivan*, 508 U.S. at 284 (Rehnquist, C.J., concurring) ("[A]ny time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know for certain what factors led to the jury's verdict.").

This case, however, does not require the Court to determine whether, or when, reliance on "overwhelming evidence" presented by the government could be an appropriate method of conducting harmless-error review of an instructional omission (or misdescription) of an element. Even if that method of harmless-error review were categorically improper, petitioner is mistaken in contending that a defendant's sworn admissions in court "are simply pieces of evidence" (Br. 38) for harmless-error purposes. For nearly a century, this Court's harmless-error precedent has distinguished between evidence introduced against a defendant by the prosecution and testimonial admissions made by a defendant on the witness stand. That precedent, and the principles underlying it, make clear that the instructional error in this case was harmless in light of petitioner's admission of the omitted element.

2. In 1919, Congress enacted the first harmless-error statute expressly permitting the federal courts of appeals to disregard trial errors that "do not affect the substantial rights of the parties." Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181 (repealed 1948); see also 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). As this Court explained in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), the new law was designed to ensure that "men fairly convicted" would not benefit from "the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect." *Id.* at 760. Not until 1967, however, did the Court conclusively reject the argument that errors affecting a criminal defendant's constitutional rights are categorically immune from harmless-error review. See *Chapman*, 386 U.S. at 22; see also *Arizona* v. *Fulminante*, 499 U.S. at 306 ("most constitutional errors can be harmless"); *Rose* v. *Clark*, 478 U.S. at 579 ("if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis").

Long before *Chapman* and 19 years before the enactment of the harmless-error statute, however, this Court decided *Motes* v. *United States*, 178 U.S. 458 (1900). In that case, the Court reversed the

conspiracy convictions of several defendants, charged with murdering a federal informant, on the ground that the government had unconstitutionally introduced the prior statements of a prosecution witness who, through the government's fault, was unavailable at trial. *Id.* at 471-474. At the same time, in what has been called "[t]he sole case in which the Supreme Court even arguably applied the harmless-error rule to a constitutional violation prior to 1967,"[11] the Court upheld the conviction of defendant Columbus Motes because, unlike his co-defendants, he had taken the stand at trial and admitted that he had participated in the murder.

In finding the error harmless, the Court did not examine "whether the jury actually rested its verdict" (*Yates*, 500 U.S. at 404) on Motes' self-incriminating testimony or instead on the improperly admitted statements. Without considering the actual effect of those statements on the jury, the Court explained that, in and of itself, Motes' admission sufficed to justify his conviction: "[I]n [Motes'] own testimony enough was stated to require a verdict of guilty as to him, even if the jury had disregarded [the improperly admitted] statements altogether." 178 U.S. at 475-476. In so ruling, the Court did not purport to announce or follow a general rule of harmless-error review, for at the time there was no clear authority permitting such review of any constitutional error. The Court instead based its decision on the special status of sworn admissions by a defendant at trial: "It would be trifling with the

[11] Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1175 n.22 (1995).

administration of the criminal law to award [Motes] a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him." *Id.* at 476.

More recently, in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), this Court divided evenly on whether, as a general matter, an appellate court may engage in harmless-error review of a jury instruction erroneously stating that, on the element of intent, "every person is conclusively presumed to intend the natural and necessary consequences of his act." *Id.* at 78 (opinion of Blackmun, J.);[12] see generally *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) (holding that such instructions violate due process). Although Justice Blackmun's plurality opinion would have held that such an error ordinarily requires automatic reversal, despite overwhelming evidence of guilt on the issue of intent, 460 U.S. at 86, the plurality nonetheless recognized that such an instruction "may be harmless if the defendant conceded the issue," *id.* at 87.[13] Simi-

[12] Because he would have decided the case on different grounds, Justice Stevens did not address that issue. See 460 U.S. at 88-90 (concurring in the judgment). In *Rose* v. *Clark*, 478 U.S. at 579-580, this Court resolved the issue and held that erroneous single-element instructional presumptions are amenable to harmless-error review.

[13] As an example of such a case, the plurality cited *Krzeminski* v. *Perini*, 614 F.2d 121 (6th Cir.), cert. denied, 449 U.S. 866 (1980), which had held harmless a trial judge's erroneous instruction barring the jury from returning an outright acquittal of a murder defendant. See *id.* at 124-125. The *Krzeminski* court based that ruling on the defendant's testimonial admissions and his decision, at trial, to seek either an insanity verdict or a conviction on a lesser crime rather than an outright acquittal; thus, "[t]he only effect of the

larly, in his separate opinion in *Carella* v. *California*, Justice Scalia would have narrowly limited the categories of cases in which "conclusive presumptions could be harmless error," but he specifically included in that category cases involving "a conclusive presumption with regard to an element of the crime that the defendant in any case admitted." 491 U.S. at 270-271 (concurring in the judgment); see also *United States* v. *North*, 910 F.2d 843, 893-894 (under analysis set forth in *Carella* concurrence, instructional omission of element was harmless "in light of North's own testimony" at trial acknowledging fact at issue), modified on other grounds, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991).

Those more recent opinions establish that even those Justices who would generally reverse for *Sandstrom* error despite "overwhelming" evidence on the issue of intent, see *Connecticut* v. *Johnson*, 460 U.S. at 86 (opinion of Blackmun, J.); see also *Yates*, 500 U.S. at 413-414 (opinion of Scalia, J., joined by Blackmun, J.), nonetheless recognize that a defendant's admissions at trial occupy a category separate from "overwhelming evidence" for purposes of harmless-error review.[14] Relying on a passage in

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judge's instruction that the jury could not acquit the defendant was to minimize the possibility of jury nullification." *Id.* at 125.

[14] Petitioner suggests (Br. 10, 33) that, in *Rose* v. *Clark*, 478 U.S. at 583, this Court indicated that a defendant's concessions are irrelevant to harmless-error analysis. That is incorrect. *Rose* clarifies that a defendant's concession of an issue is not a *necessary* condition for a determination that an error on that issue was harmless, see *ibid.*, but it casts no doubt on the common-sense proposition that a concession can be a *sufficient* condition for such a finding.

Justice Blackmun's opinion in *Connecticut*, however, petitioner seeks to discount the significance of that distinction outside the *Sandstrom* context. Within that context, petitioner argues, an admission constitutes "such compelling evidence going directly to the 'ultimate fact'" that it "render[s] the [conclusive] presumption superfluous," because it *actually causes* any given jury to disregard the presumption. Br. 40 (citing 460 U.S. at 87 (opinion of Blackmun, J.)); see also Br. 30 n.9.[15] That empirical inference, petitioner continues, is unavailable where the district court omitted an element from its instructions, because in that context it is indisputable that the jury did not *actually* address the omitted issue. Therefore, petitioner concludes, an admission makes *Sandstrom* error harmless but cannot make an instructional omission harmless.

By attributing the special status of testimonial admissions to a supposed empirical effect on actual jury deliberations, petitioner would supplant the more natural explanation for that status: namely, that no sensible system of criminal justice would permit a defendant to challenge his conviction on the ground that the jury lacked an adequate opportunity for repudiating his own sworn testimony on an un-

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[15] Justice Blackmun wrote: "In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless." 460 U.S. at 87. Justice Blackmun added, however: "We leave it to the lower courts to determine whether, by raising a particular defense or by his other actions, a defendant himself has taken the issue of intent away from the jury." *Ibid.*

contested issue. See *Motes*, 178 U.S. at 476; see generally pp. 34-38, *infra*. But petitioner's explanation fails even on its own terms, because it cannot explain why an admission as to intent would render *Sandstrom* error harmless. Justice Blackmun himself believed that "a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue" because "there is no reason to believe the jury would have deliberately undertaken the more difficult task" of deciding the issue based on the facts. 460 U.S. at 84-85; see also *Yates*, 500 U.S. at 414 (opinion of Scalia, J.) (criticizing majority for conducting "hypothetical inquiry" into "whether, if the jury *had been* instructed correctly, it *would have* found" the defendant guilty nonetheless). There is no obvious reason why a jury confronted with both an admission and "the functional equivalent of a directed verdict" would consider the admission and ignore the court's instruction. Moreover, even if an admission *actually* causes a jury to disregard "the functional equivalent of a directed verdict" in the court's instruction, that would not explain why (as proposed by Justices Scalia and Blackmun) a defendant's admissions should occupy a unique status, for harmless-error purposes, apart from all other forms of "compelling evidence" (Pet. Br. 40). Ordinary "compelling evidence"—*e.g.*, videotapes of a crime—may in fact have no less "compelling" an effect on a jury's actual deliberations than an admission.

For those reasons, any distinction between admissions and "overwhelming evidence" for harmless-error purposes cannot rest on empirical inferences about what a jury "actually" considered. It must rest instead on the principle, recognized in *Motes*, that

sworn admissions at trial differ from "overwhelming evidence" not just in degree, but also in kind. When a defendant admits an element in his own testimony, an instructional error on that element is harmless not because of the admission's imagined effect on the actual jury deliberations, but because "[i]t would be trifling with the administration of the criminal law" (*Motes*, 178 U.S. at 476) to reverse a conviction because the jury did not formally ratify what the defendant had sworn was true.

That principle does not presuppose that a defendant's admission "waives" his right to a jury trial on the admitted issue.[16] A defendant's not-guilty plea puts in issue all elements of an offense and requires the government to prove those elements to the jury beyond a reasonable doubt, see Pet. Br. 34-35; *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991), no matter what the defendant admits in his testimony. Thus, petitioner observes, "even if a defendant were to formally *stipulate* to an element * * * that element *still* would have to be submitted to the jury, since the

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[16] In the civil context, some courts, but not all, have held that a party's testimonial admissions are equivalent to formal "judicial admissions" such that they *prohibit* that party from contradicting the substance of the admissions with later evidence and sometimes *compel* a directed verdict in favor of the opposing party on the admitted issue. See generally 9 *Wigmore on Evidence* § 2594a (Chadbourn rev. ed. 1981). Courts that have rejected that rule would, by definition, treat testimonial admissions as equivalent to ordinary "pieces of evidence" (cf. Pet. Br. 38) that can be rebutted and that do not compel withholding the entire issue from the jury. But whether testimonial admissions should be treated like other evidence for *those* purposes has no bearing on how they should be treated for harmless-error purposes.

government still would have the burden of proving that element beyond a reasonable doubt." Br. 36.

But that point has no bearing on the special significance of a defendant's admissions in harmless-error review. "We agree that the determination of guilt or innocence * * * is for the jury rather than the court," but "[h]armless-error analysis addresses [the] different question" of whether a conviction must be reversed for an error that "clearly had no effect on the outcome." *Rose* v. *Clark*, 478 U.S. at 582 n.11. A trial court's underlying duty to instruct on every element, a duty that federal and state trial judges can be expected to honor in good faith, is fully consistent with the remedial principle that a defendant should not receive an appellate windfall if he admitted at trial an element that the jury was not formally instructed to "find." Cf. *Mechanik*, 475 U.S. at 73 (even though procedural error in grand-jury proceedings generally could not be remedied until after trial, conviction necessarily renders that error harmless, and "the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict" for prophylactic reasons).

3. The distinct status of admissions within this Court's harmless-error jurisprudence reflects the importance of practical judgment—of common sense—in harmless-error review of defects in the submission of a case to the jury. "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475

U.S. at 681 (citation omitted); accord *Arizona* v. *Fulminante*, 499 U.S. at 308; *Rose* v. *Clark*, 478 U.S. at 577. That focus on "underlying fairness" reveals why, when a defendant unequivocally admits an element at trial, the failure to instruct the jury on that element, while error, see *Gaudin*, 515 U.S. at 522-523, is harmless.

"The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975); accord *Duncan* v. *Louisiana*, 391 U.S. 145, 155-156 (1968). But those concerns cannot help petitioner, because at trial he himself, rather than the prosecution, introduced the "evidence" at issue, and he swore that that evidence, his own unambiguous testimony, was true. The instructional omission was therefore "of no consequence as to him; for in his own testimony enough was stated to require a verdict of guilty," *Motes*, 178 U.S. at 475, so long as the jury found the other elements satisfied, which it did.

Petitioner's invocation of the jury's unique competence to "make * * * countless credibility and other factual determinations" (Br. 43) is likewise misplaced. In citing that concern, he can mean no more than this: that his conviction should be invalidated because the jury was not told that it could acquit him if it found that he had (inexplicably) perjured himself when he testified that he knew the silencer was a silencer. That argument, like the similar argument rejected in *Motes*, "trifl[es] with the administration of the criminal law." 178 U.S. at 476; cf. *Nix* v. *Whiteside*, 475

U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*."); *Cavender* v. *Cavender*, 114 U.S. 464, 471 (1885) ("[I]t does not lie in the mouth of a defendant in equity to complain that the court assumed his answer made under oath to be true and decreed accordingly.").

4. Finally, petitioner suggests that, whether or not the error in this case could have affected a rational jury's determination of guilt or innocence, it denied him the benefit of the jury's "power to bring in a verdict in the teeth of both law and facts." Br. 39 (quoting *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920)). As an initial matter, that suggestion rests on the premise that juries have a right, as opposed to an unreviewable power, to disregard "both law and facts" in acquitting a defendant. But juries have no such right: "[T]he power of juries to 'nullify' or exercise a power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent." *United States* v. *Thomas*, 116 F.3d 606, 615 (2d Cir. 1997); accord *United States* v. *Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) ("A jury has no more '*right*' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law.").

Even if judicial interference with a jury's nullification power could sometimes support a defendant's claim to reversal, however, it could not do so here, for the error at petitioner's trial had no bearing on the jury's power or inclination to nullify. The case was in fact submitted to the jury. If the jury had wished to

acquit petitioner "in the teeth of both law and facts" —out of sympathy for him or disagreement with federal firearms law or for some other reason—it had the opportunity and an uncompromised power to do so. There is no rational basis for suggesting that the jury would have been more or less likely to exercise that power if it had been instructed that, to return a guilty verdict, it also had to find what petitioner had admitted: that he knew his silencer was a silencer.

If a defendant were to admit every element of his offense at trial and then, in outright disregard of established legal rules, the district court were to enter a judgment of conviction without submitting the case to the jury at all, reversal would be warranted. Despite the admission, a flagrant and complete abrogation of the jury's role in the criminal process (cf. *Sullivan*, 508 U.S. at 281; *Rose* v. *Clark*, 478 U.S. at 578) would require some appellate remedy to vindicate society's "insistence upon community participation in the determination of guilt or innocence." *Duncan*, 391 U.S. at 156; cf. *Waller*, 467 U.S. at 49 & n.9 (violation of public-trial right causes "great, though intangible, societal loss," and defendant need not "prove specific prejudice in order to obtain relief") (internal quotation marks omitted).[17]

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[17] On the one occasion in which this Court has addressed what "amounted to" a directed guilty verdict on a charge that the defendant entirely admitted, *Horning*, 254 U.S. at 138, the Court deemed any error harmless because "on the facts admitted there was no doubt of his guilt," *id.* at 139. In *Gaudin*, this Court stated that *Horning* has been "repudiated," and characterized it as an "anomaly," in light of later decisions (not involving admissions) that indicate that it is error, and not harmless, "for a trial judge effectively to order the jury to convict." 515 U.S. at 520. The single-element instructional

But that extreme scenario bears no resemblance to this case. Petitioner received a fair trial, full jury consideration of his defense, and a formal jury verdict on every element except the one that he admitted under oath. The district court omitted that element from its instructions only because it was bound by controlling pre-*Staples* circuit law. J.A. 86. A reversal in these circumstances could vindicate no individual right and no public purpose.

B. Petitioner's Unequivocal Admissions At Trial Were Coextensive In Scope With The Limited Scienter Element Erroneously Omitted From The Jury Instructions

Although petitioner no longer explicitly denies that he admitted the knowledge element omitted from the jury instructions, compare Pet. 21 n.10, he nonetheless suggests that his admission did not cover and establish that element, despite this Court's contrary premise in granting certiorari, see 117 S. Ct. 1841 (1997). Specifically, petitioner contends (Br. 41) that "the trial court below completely omitted the essential element of *mens rea* from the jury's consideration," and that his in-court admissions were merely "relevant to that element." See also Br. 11, 30-31, 36-38, 46. Neither of those propositions is accurate: the district court did not "completely omit" the "element of *mens rea*," and petitioner's unequivocal admissions were not just "relevant to," but coextensive in scope with, the limited scienter element that the district court did omit. Accordingly, on the facts of this case, the *Staples* error at trial was harmless.

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error in this case, however, does not remotely resemble the wholesale directed verdict at issue in *Horning*.

The district court expressly instructed the jury on the only "*mens rea*" element of Section 5861 that petitioner did not admit at trial: that the government was required to show his *knowing* possession of the items found in the black tool case in his pickup truck, one of which was a silencer. See pp. 7-8, *supra*. In finding petitioner guilty, the jury found, beyond a reasonable doubt, that petitioner did knowingly possess those items.

In *Staples*, this Court recognized an additional scienter element: a defendant's knowledge that "the weapon he possessed had the characteristics that brought it within the statutory definition" (511 U.S. at 602) of, for example, a "machinegun" or "silencer." *Staples* itself involved a semiautomatic weapon that had been converted into a fully automatic machinegun. The Court's decision rested largely on a concern that, because the difference between the two kinds of weapons is not obvious on sight, Congress could not have "intended to subject * * * law-abiding, well-intentioned citizens" to punishment if "what they genuinely and reasonably believed was a conventional semi-automatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon." *Id.* at 615 (quoting *United States* v. *Anderson*, 885 F.2d 1248, 1254 (5th Cir. 1989) (en banc)).

But knowledge of a weapon's characteristics is the only scienter element that *Staples* requires and that the district court's instructions omitted. The government was *not* required to prove that petitioner knew that the law requires "firearms" to be registered (even though he did know that, see J.A. 45-47, 65) or that he knew that his "firearm" was in fact unregistered. See *Staples*, 511 U.S. at 608-609; see also *id.*

at 638 (Stevens, J., dissenting) (noting that "even petitioner does not contend that the Government must prove guilty intent or intentional wrongdoing," and discussing scienter requirements that are and are not required under *Staples*).

In short, despite his contrary suggestion (*e.g.*, Br. 41-42), petitioner's unequivocal admissions at trial were coextensive in scope with the only scienter element erroneously omitted from the instructions. Petitioner testified under oath that he "[a]bsolutely" knew "exactly" what the silencer was the moment he saw it. J.A. 75. The defense did not subsequently seek to retract, clarify, or impeach that testimony. Indeed, in requesting the instruction at issue here, petitioner's counsel acknowledged that his client had testified that "he knew it was a silencer and that they're bad, yes, sir, he certainly said that," while arguing only that petitioner "didn't say he knew it should be registered," J.A. 87, a fact the government is not required to prove. And, during closing argument, petitioner's counsel reaffirmed: "[S]ure, he knows what silencers are. Big deal." J.A. 94; see also pp. 5-7, *supra*. Given those admissions, no rational juror could have found that petitioner had knowingly possessed the item in question—a finding that this jury made—without finding that he had also known that what he possessed was a silencer. And no valid purpose would be served by ordering a new trial on the theory that petitioner was denied the opportunity to place his fate in the hands of a jury and to insist that the government prove its case. Petitioner had exactly that opportunity at his first jury trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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